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RECENT ENGLISH TRIALS.

ABDUCTION FROM A BOARDING SCHOOL.—CASE OF FREDERIC BARRATT.

Norfolk Circuit, Huntingdon, March 18, 1840.

FREDERIC BARRATT was indicted for having taken away, and detained against her will, Mary Ellis, a young lady entitled to certain moneys in the funds, and other property, for motives of lucre, with intention, as some counts of the indictment stated, to marry, and, as it was alleged in others, to defile her. Thomas Mayle was charged with having counselled, aided, and abetted, the prisoner Barratt in the commission of the felony, but was subsequently discharged for want of evidence.

Mr Biggs Andrews and *Mr Byles* conducted the prosecution; *Mr Sydney Taylor* and *Mr Gunning* were counsel for the prisoners.

The prisoner, Barratt, who is a music-master, in very considerable practice as a teacher of the pianoforte and singing, in Stamford, has a rather handsome person, and a gentlemanly exterior. He appeared at the bar like one who deeply felt the situation in which he was placed, though collected enough to make frequent communications to his solicitor and counsel.

Mr Andrews detailed the facts which he intended to give in evidence.

Miss Mary Ellis was then called. She appeared in court in deep mourning for her mother, who has died since the event which led to this trial took place, and who was dangerously ill at the time. As she was allowed to wear her veil down, her features were not very distinguishable. She is said to be very handsome, and is only in her 17th year, but, to judge from the manner of her answering in court, her intellect is considerably riper than her years. She was examined by Mr Byles, and the following are the principal points of her evidence as it bore upon the charge against the prisoner. She stated that she had first known the prisoner, Barratt, in the beginning of the year 1838, when he taught music at the school of Mrs Wilson, at Stamford,

where she became his pupil, and was instructed by him to play on the pianoforte and sing. He subsequently paid his addresses to her, which she favorably received, but her guardian and relations were adverse to the match, and insisted upon her breaking off the intimacy altogether. To remove her from the neighborhood of Stamford, where she had so many opportunities of keeping on the intercourse, they sent her to school at Miss Pocock's, at Somersham, in Huntingdonshire. There he contrived to have a stolen interview with her by means of a servant, but the thing having come to the ears of Miss Pocock, that lady wrote to her friends, who, upon receiving the information, insisted that Miss Ellis should address a letter to Mr Barratt, to say that, in accordance with the wishes of her family and friends, their correspondence and intimacy must cease for ever. That letter was addressed to the prisoner on the 10th of February last, but within a few days afterwards Miss Ellis availed herself of an opportunity to write a letter in pencil to the prisoner, to remove from his mind the impression, that, in writing the former letter to break off all further acquaintance, she was actuated by any change of sentiment, or by any other motive than a dread of living under the displeasure of her family and friends, who had given her the alternative either to renounce all correspondence with him, or cease to have any share in their affections. That last letter was written only about a fortnight before the 3d of March, on which day the act of abduction took place under the following circumstances:—Miss Ellis was walking with her schoolfellows, accompanied by the governess, Miss Veale, and Miss Maria Pocock, daughter of the mistress of the school, a little way out of Somersham. The young ladies were walking in couples, Miss Ellis and Miss M. Pocock being together in front, and Miss Veale with another young lady in the rear of 'the column,' which consisted of nine or ten couples, when Miss Ellis, who had been speaking to Miss M. Pocock respecting her discarded lover, Mr Barratt, happened to turn her head, and, on looking behind, saw him driving up with another person in a gig. She immediately exclaimed to Miss M. Pocock, 'There he is, I declare; let me take hold of your arm.' Scarcely had she pronounced these words when the prisoner came up behind her, placed his hand on her shoulder, and then, taking her in his arms, carried her to the gig, out of which he had just before alighted—she struggling and screaming, and all the young ladies screaming in unison. On placing her in the gig, he held her back in it, while the other prisoner drove off at a rapid rate on the road towards St Ives. At St Ives the other prisoner, Mayle, got out of the gig, and Barratt himself drove to the Taunton Inn, in Huntingdon, where they alighted, and he transferred her to a post-chaise. He told her, before he left the inn, that he was going to take her to her mother, who was then very ill at Peterborough. She expressed some doubt about the truth of his statement, when he said, 'If she doubted it, she might order the post-chaise for Peterborough herself.' That induced her to believe him—but when he had handed her into the post-chaise, she heard the

landlady say, 'It is 23 miles to Thrapstone,' and from that she inferred that he had not told her the truth about going to Peterborough, for she knew Thrapstone was not on the road to that place. He did drive her in fact to Thrapstone, the blinds of the chaise being down all the way; there they changed to another chaise, and thence he drove her to Wellingborough, where she stopped at the inn for a few minutes. He terrified her by producing pistols on the way, and at one time threatened to shoot himself. From that he took her in another chaise to Northampton, and passing through that town he drove her to the railway station at Weedon, where her brother, who resided in Northampton, suddenly rode up, accompanied by a police officer, and put an end to the further progress of this adventurous lover towards Gretna Green.

The cross-examination of the prosecutrix by *Mr Sydney Taylor*, lasted four hours and ten minutes. As the charge of felony mainly rested upon the evidence of this young lady, as to her not having been a consenting party in any way to the alleged abduction, great efforts were made to break it down, and obtain from her admissions favorable to the supposition that she was not altogether so adverse to the proceeding of the Lothario of this romantic drama of Somersham, as she affected to be. With this view, the whole course of her intimacy with the prisoner, from their first acquaintance down to the time of the abduction, as well as all that took place afterwards, from the 'gig and pistol scene' near Somersham, to the melancholy *denouement* at the railway station at Wheedon, was minutely gone over. There were many proofs of affection for the prisoner, which the lady denied, many that she did not remember, and many which she admitted; and which, being admitted, were sufficient to prove that up to a few days before the alleged abduction, her attachment to him, as well as that of him to her, of which frequent mutual 'vows had been registered in heaven,' remained unaltered. At the beginning of their intimacy she had offered him a pair of white gloves, which she said she had lost to him in a bet, but he declined to accept them, saying it would be an impropriety which would draw observations upon them. She had also worked him a pair of slippers, asked for a lock of his hair, and accepted of him 'a ring,' which, up to the moment when she was under cross-examination, was still in her possession, being deposited in her dressing case, at Peterborough. When at school at Stamford, she had gone to the theatre to see the performances of a celebrated conjurer, named Festo, with Mrs Wilson and her pupils. Mr Barratt came there and sat beside her. During a part of the performances the theatre was darkened for the purpose of giving a more striking effect to some of the conjurer's necromantic exhibitions, and Miss Ellis admitted that, though the prisoner did not actually kiss her while the gloom of incantation was upon the senses and faculties of the audience, he attempted to snatch a kiss, and, though he failed in that, was allowed to sit for some time with his arm round her waist. She never said a word of the prisoner's conduct to Mrs Wilson, or any of her rela-

tions, though she told some of her school-fellows of it the next day. No impropriety of conduct was imputed to the prosecutrix beyond receiving attentions, such as those which showed that she entertained a very strong attachment for the prisoner at the bar. She admitted that he had advised her to inform her own relations of her attachment for him, and the result of the disclosure was a refusal on their part to sanction the engagement which had been formed between Miss Ellis and her lover, and which led to all the unhappy consequences that followed. It was quite certain, from the young lady's admissions, that she was devotedly attached to the prisoner up to the very time of the attempt to carry her off in the way described. In all other respects, her conduct appears to have been perfectly blameless; and, indeed, until the desperate course of resorting to an act of abduction by the prisoner took place, neither party had acted in any other way than according to the allowable indulgence of lovers looking forward to a future and honorable union. A great portion of the cross-examination turned upon her conduct in the journey with the prisoner from the place where he put her in the gig until they came to the railway station at Weedon. She admitted that when passing through the turnpike-gate, on her way to Huntingdon, where the prisoner stopped to pay toll, she made no attempt to let the toll-taker know that she was carried off against her will, nor did she make any communication of the sort to the landlady or landlord at the inn at Huntingdon. She said the prisoner told her he was taking her to her mother's at Peterborough, and she did not believe him until they had got to Huntington; and yet she made no attempt to let her situation be known to two gentlemen who rode by the gig on horseback, before they got to that town. She wore her veil down during the journey, but denied it was because she feared to be known. At Northampton, she passed through the street in which her brother lived, and gave no alarm there. But what was a most extraordinary part of this strange affair, the brother, when he took her from the prisoner, allowed them to have a private conversation together, in a room at the inn, while he retired to the window; he also drank a part of a bottle of Sherry with the prisoner, who kissed his sister, with one arm round her neck, before they parted; made an agreement with her to correspond, which she said she did not mean to keep, being disgusted with his conduct, and yet shook hands with him, and bid him 'good bye,' when the chaise in which her brother had placed her was about drive off.

Miss Maria Pocock and *Miss Veale* corroborated the statement of the prosecutrix as to the scene of the abduction, the conduct of the prisoner when he drove up in the gig, seized upon the person of Miss Ellis, and carried her off struggling and screaming.

Miss Maria Pocock, on cross-examination, admitted that, a few days before the alleged abduction, and subsequently to the writing of the letter in pencil, the prosecutrix told her that "she would never change her sentiments towards Mr Barratt, and would marry him as soon as she should be of age." (Miss Ellis had been previously

asked on her cross-examination, whether she had not made such a declaration, and she said she did not remember, and did not think she ever had used such words.)

A miller, named Gravely, who had seen the transaction from the window of his mill, and a confectioner named Josiah Taylor, who was coming along the road, confirmed the other witnesses as to the force applied, and the resistance of the young lady. The latter added that when he met the prisoner driving off in the gig, he was holding a white handkerchief to her mouth to prevent her crying out, but no other witness pretended to have seen anything of the sort.

The usual legal proof of the prosecutrix being a lady entitled to property was given. It was proved that she would, when of age, be in possession of 2100*l.*, partly in the funds, and partly out at a mortgage, under the will of a Mr Whitwell, a relation. It is understood that she will be entitled to more than double that property, but the prosecutor's counsel had not the means of giving the necessary formal proofs of it. It was proved that the prisoner said he had seen the will of Mr Whitwell, and that he knew Miss Ellis would be entitled to 220*l.* a year.

The letter of the prosecutrix, of the 10th of February, and her pencilled letter, were then read in evidence.

"Somersham, Feb. 10, 1840.

"Dear Sir,—By the earnest entreaty and advice of my friends, and from my own conviction of its being the right path for me to pursue, I am induced to write to you to say our correspondence and intimacy must now cease for ever. You are well aware that it has always been contrary to the wishes of my friends and best advisers. and my own judgment tells me that I could have no happiness in living under their displeasure. Their firm determination, I find, is to discard me entirely from their homes and affections; they have left me but two alternatives, and it would make me miserable to be unfriendly with my nearest and dearest relatives. I hope you will consider this decisive, for I am firmly resolved to abide by my present determination; and remain yours, &c.

"MARY ELLIS."

"Somersham, Feb.

"My dear Mr Barratt,—If I may be allowed to address you so familiarly, for 'sir' is so very cold—in fact I cannot bear it—perhaps when you see the signature of this letter you will be inclined to throw it away without reading it; but I must beg your attention for a few minutes, though I well know I do not deserve it, even for a moment. The reason I trouble you is because I wish you to know all, and with the hope that you will then not blame me so much.

"When you came to Somersham, you no doubt recollect a person passing through the yard; it was an old servant of Miss Pocock's; she recognised me, and two days after the school commenced she told Miss P., who, of course, told me she knew, and that they intended to write to my friends, whom I received a letter from some days after, with nearly these words, saying that they left me my choice, my own dear friends and home, or to continue my acquaintance with you; if so they intended to banish me forever from their

home. Now you know well it was impossible for me to do that as I am so young; if I had been older I should have acted very differently. I need hardly add that it has caused me more unhappy hours than I hope I shall ever have again; but I am sure I shall not, at least on that point, for it is my full determination never to marry. Perhaps you may smile, but I can assure you I am sincere, and, though this is the last time I shall ever address you, think not that I can ever forget one whom I so highly esteem. If possible you will be more in my thoughts than before, and to GOD, who alone knows my heart, my prayers will always be offered up for your happiness and welfare; and I hope with His assistance I shall be able to bear all this with fortitude.

"Oh! what a blessing it would have been, both to you and I, if Mrs Newberry had acted rightly when she knew, which I know she did, to have spoken about it, for I shall partly blame her for blighting my future happiness. I have one favor to ask you, which I hope you will comply with, as it will be the last perhaps forever, that is, that you will never pass me in Peterborough or any other place you may meet me in, without speaking to me. This may be an improper request, but if you did, no words can express my feelings. I think it would almost kill me. I must beg of you to excuse this being written in pencil, for I dare not be seen with a pen and ink in my hands. I have nothing more to add, except that I hope you will accept my best wishes for yourself and dear friends, and believe me to remain now and always your very sincere friend.

"MARY ELLIS.

"P. S.—Miss P. forced me to send your letter back. I mention it, for perhaps you thought it unkind. Farewell, and may the ALMIGHTY watch over you."

Mr Sydney Taylor then addressed the jury for the prisoner. His speech occupied an hour and three quarters, in commenting upon the bearings of the evidence; but as to the law of the case, he relied mainly upon the want of satisfactory proof, even if the jury should be of opinion that the prosecutrix had not been directly or indirectly a consenting party to her own abduction, of the prisoner having been actuated in what he did from motives of lucre. He contended, that if the prisoner carried off the lady against her own consent, and was instigated to that course by the natural desire of an ardent, unreflecting lover to rescue her from the condition of constraint in which she was placed, and make her his wife from affection for her person, and did not seize her person as the means of getting possession of her property, the charge of felony could not be sustained. The policy of the law was to prevent the practices of cold and heartless speculators, who, without having the slightest feeling of affection for a female entitled to some present or future interest in real or personal property, or, perhaps, having any previous intimacy with the person marked out as the victim of contriving cupidity, deliberately planned the getting such females into their power by force or fraud, in order to obtain the pelf, on which, alone, they had fixed their affections. He urged, that, from the whole of the circumstances of this case, it was evident that the attachment between the parties was strong and mutual, and that the prisoner was most passionately fond of the young lady, to insure an honorable union with whom he had encountered perils, such as proved

what an irresistible dominion, love had over his heart. He urged upon the jury, that the young lady did not appear before them as a willing prosecutrix. There was 'a pressure from without' upon her, and that external control which had compelled her to write the letter to discontinue the acquaintance, caused her cruelly to falsify the feelings, wishes, and emotions of her own heart. Though there was force sworn to on his part, and resistance upon hers, yet it was not unreasonable to suppose that, under the circumstances which her pencilled letter, and her declaration to Miss Maria Pocock disclosed, she might not, in her own mind, have been quite so much displeased as she appeared to be at the prisoner taking the decided step of giving her the means of escaping from the state of thraldom in which she had been placed. That letter in which she informed the prisoner that she had acted under the constraint of friends, and in which she used the strong expressions' 'think not that I can ever forget one whom I so highly esteem. If possible you will be more in my thoughts than before, and to GOD, who alone knows my heart, my prayers will always be offered up for your happiness and welfare, and I hope with His assistance, I shall be able to bear all with fortitude,' might well have impressed his mind with the notion that if he offered her the means of escape from such painful control, she would not be very unwilling to avail herself of them. In that very letter she had intreated him not to pass her in Peterborough, or elsewhere, without speaking to her, and told him if he did she was sure it would almost kill her. He asked the jury, as men having experience of human nature, whether such language from a beloved object, supposed to be in a state of, at least, moral coercion and captivity, was not sufficient to prompt and impel the prisoner to take the violent step which he did to rescue a tender, devoted girl, and to place her beyond the reach of those whose interference had made her miserable and him desperate, without being in the slightest degree influenced by the sordid and base motive of 'lucre,' which the indictment alleged? The learned counsel contrasted the circumstances of this case with that of *The King v. Wakefield*, which occasioned the present law to be passed to amend the old statutes with regard to cases of abduction. In that case, the parties had no previous intimacy, and therefore all inducement to the act arising from real passion and affection was out of the question. The abduction in that instance, as well as in almost every other that had been made the subject of penal inquiry in courts of justice, was to be accounted for on no other grounds than those of cold and sordid calculation to get possession of a lady's property by first obtaining possession of her person. Where real love—where a genuine fervent attachment was proved to exist—why need they look for any other cause? Was not the very existence of that absorbing sentiment which belonged to true love an all-powerful motive of itself to acts of daring and of danger, such as was the wild and thoughtless enterprise of the prisoner, to restore to liberty the lady of his love? Was not the influence under which he acted—acted as he admitted, in a most unre-

flecting manner—the mightiest of all human passions? Was not the history of human nature full of the instances of daring deeds and acts of self-abandonment which it had impelled men under its fascinating influence to commit? Was not the generous ardor of such a passion, however it might be disapproved of by cold reason and stern philosophy, wholly incompatible with the base and grovelling desire of gain—the lowest, meanest, most contemptible motives that could sway the mind of man in soliciting a lady's affection? But here was no proof that any solicitation of the sort ever came from the prisoner at the bar. Very early in their acquaintance, the jury would recollect the circumstance of the pair of white gloves, which she had begged him to accept, showing, at all events, that she was as ready to receive his addresses as he was to tender them; nor would they forget the scene at the theatre at Stamford—nor the lock of hair—nor the ring, which she still treasured among things the most precious in her possession, as she did, he was convinced, the passion for her persecuted lover in the secret recesses of her heart. He again pressed it upon the minds of the jury, that, if all the other requisitions of the statute, constituting this highly penal offence charged in the indictment, were made out to their satisfaction, yet if they disbelieved or doubted that the governing motive to the act was a calculating and heartless desire of mere lucre—if, on the contrary, the whole of the evidence went to show that the act, foolish and blameable as it was, was prompted and inspired by the warmth, devotion, and energy of a lover's agonised feelings, worked upon by distressing communications from her whom he loved, 'not wisely, but too well'—if they believed that, under the influence of uncontrollable passion, he sought to possess himself of the object of his unreasoning fondness for the love he bore herself, and her alone—they were bound in conscience and law, and by every dictate of reason and justice, to deliver him, by their verdict, from the punishment that would justly attach to one actuated by less honorable motives—they were bound to regard him as an object of compassion and sympathy, rather than of judicial indignation, and to rescue him from the shame, the ignominy, the blighted character, and penal sufferings, of a conviction for felony.

Mr Baron Parke summed up the evidence, and explained the law to the jury in a most luminous and able manner. In the outset he stated, during the whole course of his professional and judicial experience, which was not a short one, he had never met with such a case as the present. He agreed with what had fallen from the learned counsel for the prisoner as to the main distinction which existed between the case of *The King v. Wakefield* and the present one, there not having been, in the former case, any previous intimacy between the parties. He also agreed with what the prisoner's counsel had stated in that part of his able address in which he argued, that, if all other requisitions of the statute constituting the offence were satisfied, and yet the evidence of the motive being the base and sordid one of lucre was unsatisfactory or insufficient, their duty would be to

discharge the prisoner of the accusation of felony. His lordship then proceeded to state that two requisitions of the statute were made out beyond all question, one, that the prosecutrix was a lady entitled to a contingent, if not a vested interest in personal property; the other, that the prisoner took her away with the intention of marrying her. As to the other intent laid in the same count of 'defiling her,' there was nothing in the case that showed he ever had such a foul intent, and, therefore, the jury might discharge it from their minds; but if they should be convinced from the evidence, that, the prosecutrix, being a lady entitled to property, he took her away or detained her against her will, with the intent of marrying her, but for the base purpose of getting possession of her property, their duty would be to convict him of the felony; and he knew that, however painful to their feelings the exercise of that duty might be, they would discharge it with firmness. The learned judge, after some further observations of a general nature, proceeded to read the evidence and comment upon it as he proceeded, showing its bearings upon all the material allegations of the indictment. He adverted to some expressions of the prisoner which had been given in evidence respecting the property of the lady, such as having told a witness that he had seen the will, and that she would be entitled when of age to an income of 220*l.* a year. This might enable them to form an opinion upon the question whether he was influenced by motives of lucre or not; but, unless they were satisfied that such a motive prompted him to take the prosecutrix away against her will, they would, as he said before, discharge him of the felony, and in that case they would turn their attention to the question of the force used, and if they believed he had used force to accomplish his object, they could, under the present indictment, convict him of the assault.

The jury consulted, without leaving the box for about twenty minutes, and then returned a verdict of *not guilty* of the felony, but *guilty* of the common assault, with a recommendation to mercy on account of the inducement held out to him.

Mr Baron PARKE then addressed the prisoner, and told him that, if he had been convicted of felony, he would certainly have transported him. The jury, however, believed, that, though he used force to get the person of the prosecutrix into his power with a view to marrying her, he was not actuated by motives of base lucre, and he agreed with the view the jury had taken. It was necessary, however, for the protection of society, that an assault of the nature of that which he had committed should not be lightly punished. He might sentence him not only to imprisonment, but hard labor by law, and had he believed, which he did not, that he had the intent of defiling the prosecutrix, hard labor would have been inevitably added to the temporary deprivation of his liberty. His lordship then ordered the prisoner to be imprisoned in the county gaol for the term of 15 calendar months.

RECENT AMERICAN DECISIONS.

Municipal Court of the City of Boston, October Term, 1840.

COMMONWEALTH v. HUNT AND OTHERS — JOURNEYMEN BOOTMAKERS.

The principles of Trades Union Associations, so called, are repugnant to the declaration of rights of the people in the constitution of Massachusetts.

The gist of the offence of conspiracy consists in the unlawful confederacy to do an unlawful act, to the prejudice of another person :—any unlawful act done in pursuance of it, is no constituent part of the offence, but merely an aggravation of it.

A combination among journeymen bootmakers, to compel, by force of numbers and discipline, and by imposition of fines and penalties, other journeymen to join their society, and masters to employ none but members; held, to be an unlawful conspiracy against the common law of Massachusetts.

Where a witness was asked a question, upon his cross-examination, the answer to which was not relative to the issue on trial, as not having a tendency to prove or disprove it, and not arising out of the examination in chief; it was, on objection for that cause, ruled out.

In criminal trials, the verdict of the jury is compounded both of law and fact. But as the jury is sworn to give their verdict *according to evidence*, the law is, so far as they are concerned, a question of fact, to be settled by evidence :—and where the parties are at variance on the question of law, the jury may receive it from the judge, who is a sworn witness for that purpose. The jury will be justified, in conscience, to follow the instructions of the court in matter of law; and if the defendant feels aggrieved by such opinion or instruction, it will be the duty of his counsel to except to the same, and to carry it, for revision, to the supreme judicial court.

One who had repeatedly avowed his disbelief in the being of a God, and in all religious obligation and accountability, was not permitted to be sworn as a witness, although he was the complainant and prosecutor in the case, and the indictment was founded on the injury done to him.

CONSPIRACY. The indictment consisted of five counts. The first charged, substantially, that John Hunt, Patrick Hayes, Daniel O'Neal, Sapplier Woods, Michael O'Conner, and Edward Farrington, with others unknown, intending to form themselves into an unlawful club, and to make unlawful by-laws, and unlawfully to extort money, conspired together and agreed that none of them would work for any master or person whatever, in their art, as boot-makers, who should employ any other person in that art, who was not a member of their said club, after notice given to him to discharge such workmen from his employ. The alleged offence was set out in four other counts, as will appear farther on. The defendants elected to be tried this term, although they had a right to a continuance, the bill having been found at this term.

S. D. Parker, attorney of the commonwealth for Suffolk, in opening the prosecution, briefly described the nature of the offence, and referred to several authorities. The indictment was founded on the common law of the commonwealth, which was incorporated into our judicial system by the people, in the 6th article of the 6th chapter of the constitution. For a definition of the offence, he quoted 1 Hawk. P. C., ch. 72, sec. 2, where it is said, "there can be no doubt, but

that all confederacies whatever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person," &c. The law, had been recognised by the supreme judicial court of Massachusetts in divers instances, particularly by Parsons C. J., in *The Commonwealth v. Samuel Judd et al*, (2 Mass. R. 328.) He also referred to the case of *The King v. Journeymen Tailors of Cambridge*, (8 Mod. 11); (1 Black. R. 392); also to *The King v. De Berenger and others*, (3 M. & S. 68.) The indictment in this case followed the form in the case of *The People of the State of New York v. James Melvin and others*, (2 Wheeler's Criminal Law Cases 262,) in the trial of which case eminent counsel were engaged, and that of *The People of New York v. Fisher and others*, (14 Wendell, 1,) in which the law of conspiracy is stated with great learning and ability by Savage C. J.

The evidence was then put in. When Jeremiah Horne, the complainant and prosecutor, was called as a witness, on behalf of the commonwealth, the counsel for the defendants, *Rantoul* and *Kimball*, objected to his competency, on the ground, that he was an atheist. Sundry witnesses, called by them, testified that they had heard him, in frequent instances, avow his disbelief in the being of a God, and in all religious obligation and accountability. As their testimony was not contradicted, he was not permitted to be sworn as a witness.

In the course of the trial, *Grant Leonard* was called as a witness for the prosecution, and, upon cross-examination, he was asked by *Rantoul*, "what was the price of flour in the year 1835, when the society was established?" To this question, *Parker* objected, on the ground that it was irrelevant to the issue on trial, and that the answer, whatever it should be, could have no tendency to prove or disprove the issue. *Rantoul* argued, that it was, in his opinion, material to shew, that the object of the defendants, in forming their association, was both innocent and lawful; inasmuch as their object was to raise the price of wages only in proportion to that of flour and the other necessaries of life.

To this it was replied, that the defendants were not on trial for a conspiracy to raise their wages, but for other unlawful purposes. As there was no allegation in the indictment, that the defendants had conspired to raise the price of wages; it was not necessary for the defence, to enter into the boundless field of inquiry as to the price of the necessaries of life.

But, on the contrary, *Rantoul* contended, that, at the time of the formation of the society, all orders, ranks and divisions of society, throughout the country, had combined to raise the price of their commodities, and that everything useful or necessary, was at a high fictitious value: that these journeymen boot-makers had combined only for the same purpose, in self-defence, and that what was lawful for others was innocent in them.

THACHER J.—I will not stop to inquire, whether a conspiracy to raise the price of wages, or any other valuable commodity, is not a misdemeanor in law, as is expressly laid down in some authorities, which have always been held in great respect. It is only necessary, for the decision of the present question, to inquire what is the issue on trial. The evidence must be confined to the issue, or we shall never get to the end of a trial. After careful examination of the several counts in the indictment, I find no charge against the defendants, of a conspiracy to raise their wages. The gist of the charge is for conspiring to prevent master boot-makers from employing any journeyman who is not a member, and to compel all other journeymen of the craft to become members of the society, and to submit to their unlawful rules. If the object was merely to maintain a rate of wages in reasonable proportion to the price of other commodities, it might be pertinent to show the price of flour. But as the defendants are not charged with conspiring to raise their wages, and cannot be found guilty of that offence, if it is one; I am of opinion, that it is not relevant or pertinent to the present issue, to inquire into the price of flour, or other necessary articles, at the time the club was formed.

The constitution and rules of this society have been read in evidence, to prove that a conspiracy existed among these defendants and others, for the purposes charged in the indictment. It will be for the jury to settle, whether they prove or tend to prove, with the other testimony, that fact. The book must speak for itself, and is open to the comment of the learned counsel. Whether the object of the club was good or bad, can derive no light from an inquiry into the price of flour. Without meaning to limit the comments of the counsel upon the evidence, I must remark, that an ostensible good motive cannot excuse a real infraction of law,—that one crime will constitute no justification for another;—and that it is no excuse for these defendants, if they have incurred the guilt charged in this indictment, that others have committed a like offence.

To the ruling of the court, excluding this question, the defendants' counsel excepted, and the same was allowed. In the examination of witnesses, various questions of law were settled; and where either party excepted to the ruling of the court, the same was noted and allowed.

The counsel for the defence, rested their case chiefly on the ground, that it was not against the common law of Massachusetts for individuals to enter into associations in restraint of trade.

Kimball argued, 1st. That the injuries complained of, were private in their nature, and not a subject of criminal accusation. No injury had been done, and what sums had been exacted from members had been voluntarily assessed and paid.

2d. That similar confederacies had been got up among members of other professions, particularly among lawyers and physicians: from which he inferred, that societies of this description were not considered in violation of the common law of Massachusetts.

3d. That the jury were judges of the law as well as of the fact.

4th. That the defendants had done nothing more than they had right to do : and that all they had done was but in self-defence.

Rantoul enlarged upon these points ; and in an argument which occupied two days, he entered fully into the subject, and contended

1st. That the trial was for an offence not known to the laws and courts of this commonwealth.

2d. That the jury must find the law as well as the fact : the trial by jury being the shield of the people against violations of the constitution by the legislature, and new and hard constructions of the law by the courts of justice.

3d. That there was no law against conspiracies in restraint of trade, unless the common law of England, before the American revolution, was in force in this state.

4th. That there ought not to be such a thing as a common law crime.

5th. That we have not adopted the mass of the common law of England, nor their statutes, either before or since the emigration of our ancestors to this country. But that they brought with them and adopted only that portion of the common law that was applicable to their situation. He examined the course of legislation in England from the time of Edward I. and the decisions of the courts of that country, to the present day. He referred also to the various reports of the courts in all the other states of the Union, and particularly to the constitution of this commonwealth, and the cases in our own reports, to show that this indictment was without precedent, and not warranted in law. He closed his argument with an animated view of the evidence, and insisted, that the defendants had done nothing but for the good of their trade, and for the benefit of the public.

Parker occupied two hours in closing his argument for the commonwealth. He took a condensed view of the several points of law, and answered, with great learning and effect, the closing argument for the defence. Having gone very fully into the law, in opening the prosecution, he confined himself in this argument to the consideration of four questions, viz : 1st. Is there such a club, society, or combination, as is described in the indictment ? 2d. Do all these defendants belong to it ? 3d. Are its objects such as are set forth ? 4th. Is a combination to effect by force and coercion those objects lawful, or is it an unlawful conspiracy ? [1]

THACHER J. charged the jury as follows :[2]—Your patience, gentle-

[1] This argument will be found at length in the Boston Daily Advertiser of October 23. For the arguments of Rantoul and Kimball, see the Boston Morning Post and Boston Times.

[2] The arguments of the counsel are already before the public. We can only refer to them, replete as they are with learning, for the various authorities on which they relied. We have room only for the instructions of the judge to the jury, which we are enabled to present from his own minutes, and in which most of the topics relied upon by the counsel will briefly appear.

men, has been already so well disciplined in the hearing of this cause, that I think you will not grudge the few moments which remain, and which the court may occupy in committing it to your final decision. The learned counsel on both sides have not been restricted in their course, and have eloquently and faithfully done their duty. I do not regret the time which they have occupied, nor the minute and extensive learning which they have expended on the cause, although it will not be possible for the court to do justice to it at this time. But it will become the court also to exercise like freedom: the more especially, as there is a higher tribunal to which the defendants may apply, if they should feel aggrieved or injured in any opinion or matter of law.

The counsel for the defendants asserted to you, when he commenced his closing argument, that his clients were on trial for an offence, unknown to the laws or practice of this commonwealth. As he has been met with a counter assertion from the attorney of the commonwealth, you have the opinions and assertions of these learned jurists opposed to each other in argument, on a point which lies at the foundation of this prosecution. It is very true, that your verdict is to be compounded both of law and fact. If you pronounce the defendants guilty, you will, in effect, declare, that conspiracy is an offence against the common law of the commonwealth, and that the defendants have incurred the guilt of that crime. But if you undertake to find the defendants not guilty, because you believe, that no such offence is known to our law, and without an examination of the facts proved against them in evidence; you will, I think, assume a degree of responsibility, which is not devolved upon you by the obligation of your office as jurors.

You are sworn to try the issue between the commonwealth and the defendants, "*according to your evidence*," (R. S. ch. 137, sec. 7.) Whether the charge in the indictment is an offence in law, is, so far as you are concerned, a question of fact, and is to be settled, like other facts in the case, by evidence. If the contending parties agree in the law, their consent will be good evidence of that fact. But where they are at variance on this point, you can only look to the judge for evidence; as he is a sworn witness in matters of law, and bound by his office to state the law to you truly, according to his knowledge and belief. If the defendants should find themselves aggrieved and injured by the opinions and instructions of the court, it will be the duty of their counsel to except to such erroneous matter, that the same may be carried to the supreme judicial court for deliberate revision and correction by that tribunal. But if you should go counter to the evidence which you should so receive from the court, and should assume to say that the law is otherwise, you perceive that you will take upon yourselves the whole responsibility, and may, while acquitting offenders on such ground, do an act of injustice to the whole community. So far as the question of guilt and innocence depends on matter of fact, you are the final and responsible judges, and your verdict is conclusive.

But if the court should err in matter of law, to the prejudice of the defendants, there is, happily, an appeal to a higher tribunal.

That conspiracy is an offence against the common or unwritten law of this commonwealth, I infer from the fact, that there have been frequent trials and convictions for such offence before our supreme judicial court. But it has been argued by Mr Rantoul, with great earnestness, and by appealing to a great array of authorities, that no indictment for conspiracy will lie, unless it be founded on a combination of two or more persons to commit a *criminal* act, which would of itself be an indictable offence. But this is not, in my opinion, a correct estimate of the law. At the supreme judicial court in the county of Suffolk, February Term, 1803, Abel Boynton and four other persons were indicted and convicted of a conspiracy to cheat and defraud Bond & Bryant, merchants in Boston, by false pretences. The conspirators sent Goodhue, one of their number, to Messrs Bond & Bryant, and by means of an artful story only, which he was instructed to tell, and which they were to confirm, if his word was doubted, all which is set forth in the record, he obtained from Bond & Bryant a quantity of goods amounting to $383 56, which the conspirators divided among themselves. The court consisted, at that time, of *Francis Dana*, Chief Justice; *Robert T. Paine*, *Simeon Strong*, *Theodore Sedgwick*, *Samuel Sewall*, and *George Thatcher*. The attorney general, who conducted the prosecution was *James Sullivan*. The counsel for the prisoners were *Theophilus Parsons*, afterwards chief justice, and the late *Timothy Bigelow* and *David Everett*.

The counsel for the defence contended, that a confederacy to defraud another was not a criminal act, unless the fraud itself was indictable at common law. It was true, that the defendants had concerted together a gross fraud; but it was executed by one of their number only, and by means of a naked lie. The remedy, therefore was to be obtained only in a civil action. But the court instructed the jury, that, if they believed that the defendants had confederated together to perpetrate the offence, and that to each was assigned his part to act, if necessary to its success, they must convict all; inasmuch as the offence consisted in the confederacy to do an unlawful act. This case has great weight in my mind, because it was decided before the act was passed, which made it an indictable offence to cheat another by false pretences, and by judges who were familiarly acquainted with the common law before the adoption of our state constitution.[1] The defendants were convicted, and sentenced to be put in the pillory, and to be imprisoned in the common jail.

An indictment for a like offence was tried at the same term of the supreme judicial court, February, 1803, in Suffolk county. It was the case of the *Commonwealth v. Robert Pierpont and another*, for a

[1] Judge Thacher said, that he attended this trial, and he read from a manuscript a note of it which he took at the time. The act against cheating by false pretences was not passed until 1815, ch. 136, which has since been taken into the Revised Statutes, ch. 126, sec. 32.

conspiracy to defraud underwriters. They were defended by Mr Parsons, but were convicted, and sentenced to a like punishment.

Both these cases were decided before the commencement of the publication of the series of Reports in this commonwealth. But the law will be found to be so held by the court, in the case of the *Commonwealth v. Warren*, (6 Mass. R. 72,) and that of the *Commonwealth v. Judd*, (2 Mass. R. 329.) In addition to this evidence, the legislature have recognised the offence of conspiracy at common law, without attempting to define it. Act of 1832, ch. 130, sec. 3; also R. S. ch. 82, sec. 28, and ch. 86, sec. 10.

You perceive, then, gentlemen, that the defendants are on trial for a conspiracy: and it is an offence against the law of this commonwealth for two or more individuals to combine to commit an unlawful act, or even to do a lawful act by unlawful means, to the injury of the public, or of any individual. *Commonwealth v. Judd et al*, (2 Mass. R. 329, per Parsons C. J.) The gist of the offence consists in the unlawful confederacy, and it is complete when the confederacy is made; and any unlawful act done in pursuance of it, is no constituent part of the offence, but merely an aggravation of it.

Two persons must join to commit the offence, and many may be involved in its guilt. If such an offence has been committed in the present case, and you should find that any one of these six defendants was engaged in its commission, you will have right to find him guilty, although you should acquit all the others; because the offence is described, in the indictment, to have been committed by the defendants, "with divers other persons whose names were unknown to the jurors."

Some of these defendants may be guilty, and the rest innocent. You must, therefore, pass on the case of each, as though he alone was on trial. One offence only, was intended to be charged; but it is described in five different ways or counts, to meet the testimony on the trial. If you find that the proof fails as to any one or more of the counts, your verdict must go no further than the evidence will warrant, and there must be an acquittal of the residue.

In what is the guilt of the defendants charged to consist? This question is to be answered by an inspection of the indictment.

The defendants are journeymen boot-makers, have formed themselves into what is called elsewhere Trades Union Society; and I may remark here, that whether they were all members at the time of its original formation, or voluntarily joined themselves to it afterward, they are in the eye of the law, all involved in the guilt of the conspiracy, although that may, as to each, vary both in amount and aggravation.

1st. The charge in the first count of the indictment is, substantially, that the defendants, intending to form themselves into an unlawful club,

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[1] This case led to the law of March 8, 1803, "to prevent the destruction and casting away of ships and cargoes." See Act of 1802, ch. 136.

and to make unlawful by-laws, by which to govern themselves, and other workmen in their art, and unlawfully to extort great sums of money, conspired together and agreed, that none of them should thereafter, and that none of them would work for any master or person whatever, in their art, as boot-makers, who should employ any workman or journeyman, or other person in that art, who was not a member of their said club, after notice given to him to discharge such workman from his employ.

Although this agreement is declarative of a negative act only, yet you are to consider, whether it was not intended to have a compulsory and injurious operation upon master boot-makers, and on journeymen boot-makers, who were not members of their society. It is undoubtedly true, that each of these defendants might lawfully refuse, individually, to work for any one as he should think fit. The illegality of the agreement consists in the design and tendency, by a concentrated action, to injure and control others. If the defendants intended and expected, by means of this confederacy, to benefit themselves, at the expense of the rights of others, and by an unlawful invasion of those rights, it was an offence. It is an unlawful means to effect an unjust and injurious purpose.

2d. The second count charges a general confederacy of the defendants, with others, not to work for any boot-maker who should employ any workman not being a member of a certain club, called the "Boston Journeymen Boot-makers' Society," or who should break any of their by-laws, unless such workman should pay to the club such sum as should be agreed on as a penalty for the breach, and that by means of that conspiracy, they did compel one Isaac B. Waite, a master cordwainer, to turn out of his employ one Jeremiah Horne, a journeyman boot-maker, because the said Jeremiah Horne would not pay a sum of money to the society, for an alleged penalty of some of their unjust by-laws.

The illegality described in this count, consists in the conspiracy to compel Waite, who was not a member, and owed no allegiance to this society, to dismiss from his employment Jeremiah Horne, because he would not submit to pay a penalty, which they had no right to impose upon him. It alleges an unlawful interference with a subsisting contract between other persons, in which the defendants had no legal interest, nor right to interfere. I therefore consider it the allegation of a conspiracy to do an unlawful act to the injury of other persons.

3d. The defendants are charged in the third count with conspiring to impoverish one Jeremiah Horne, by hindering him from following his trade, and thus depriving him of his means of subsistence; which is clearly an unlawful act.

4th. The fourth count is a general charge against the defendants of conspiring to prejudice one Jeremiah Horne, and to prevent him from exercising his trade as a boot-maker.

5th. The defendants are charged in the fifth and last count, with an

unlawful conspiracy to impoverish Isaac B. Waite, Elias P. Blanchard, Davis Howard and others, master cordwainers and others employing journeymen boot-makers, who should employ any journeymen boot-makers, who would not, after notice, become members of their club, or who should break any of their rules.

These several counts describe a confederacy, aggravated by unlawful overt acts, constituting the offence of conspiracy. Although it was lawful for these defendants, individually, to refuse to work for any master boot-maker who should employ a journeyman, not a member of their society; yet if they combined together to control by the force of numbers, the employment of other persons, or to extort from any one the payment of sums of money not justly due; I consider, that both the means and the object were violations of law. Such interference is repugnant to trade, commerce, and employment, which should be free to every citizen, as the air which he breathes. It amounts to the crime of conspiracy, not by any written statute of the legislature, but by the common law of the state, deduced from the constitution, and recognised as a fixed principle of government, by the decisions of the highest judicial tribunal. When the people of this commonwealth adopted into their code the law of a foreign country, in whole or in part, that became our own law, and it is not to be stigmatized as the law of England, of France, or of Rome. Almost all our laws, regulating trade and commerce, in their innumerable branches, have been drawn from the experience of other nations, and have regulated the intercourse of men in all ages, ancient and modern. Why should we not avail ourselves of the fruits of the wisdom and experience of other nations, as well as of the productions of their climates, and the fabrics of their manufacturing industry? The nations of the earth are rapidly approaching to each other, and will finally constitute but one great family or brotherhood.

But, gentlemen, you cannot lawfully find either of the defendants guilty, unless you are satisfied from the evidence, that the conspiracy existed. If, however, the conspiracy is proved to exist, to your satisfaction, then the separate acts of each conspirator are chargeable to the whole body. For the offence supposes in its nature a community of guilt, for which all and each are answerable. Ordinary prudence is not usually sufficient to guard against the combined power of numbers acting together in concert, with secresy and craft, and to a common object. The rigorous application of the rule, that the acts of each are chargeable to all the conspirators, is absolutely necessary to prevent the offence.

What evidence has the government offered to prove the alleged conspiracy?

The attorney of the commonwealth read a notice, which had been served upon the defendants and their attorneys, to produce at this trial the original constitution of the club, and the records of their proceedings. They were not bound to comply with this notice, as these documents might operate to their prejudice; and by the advice of

their counsel, they have been withheld. But if this club was formed under a belief of right, and without intentional wrong; it would have availed much in favor of the defendants, to have produced these documents, and to have submitted themselves, like good citizens, to the judgment of the law. It would have shewn, that if they had erred in principle, they were ready and desirous to correct their error. The benignity of the common law never deals in hard constructions. It is averse to pains and penalties, and delights to relieve the citizen, whose fault has flowed from the head rather than from the heart. The defendants have made no disclosure of their constitution and records, which are still locked up in their repository. The evidence of the existence and proceedings of the society have come to us in fragments. The strictest rules of evidence have been observed, and all illegal or doubtful testimony has been excluded. But the evidence, that there was such a society, and that the defendants were members, was so full and satisfactory, that their counsel have admitted the fact in their argument, and also that the printed constitution and rules which have been read are true transcripts of the originals which are in their possession.

Were the unlawful acts and objects, which are specified in the counts of the indictment, carried into effect? In other words, did the conspiracy rest in the heart of the conspirators; or was it manifested and aggravated by overt acts?

[The judge here read from his minutes of the evidence, the voluminous statements of the several witnesses, which were numerous, and which need not be here repeated.]

Was the conspiracy for an unlawful object? The constitution of this society is an important document, as, like a record, it speaks for itself, and cannot be contradicted. Every member signs it at his initiation, and pays a fee. It is the soul of the club. You may have perceived in this case, as in other secret associations, the strength of the spirit of the society. The members who were called as witnesses, were not only careful to conceal their own share in its formation, but were most unwilling to reveal any fact which might tend to impeach their associates.

In the preamble, the members pledge themselves to be governed by their constitution, and to support it in all its bearings. They avow their intention to regulate their wages by a concentration of feeling and action with their brother craftsmen. The association is to be as extensive as the country, and to make itself felt throughout its cities and towns. It is apparent, that they expect by this Union, to regulate the trade of boot-makers, although they profess to intend to do nothing in opposition to the laws of this commonwealth. You must judge, whether they do not propose, by means of this league, to control all masters, journeymen, and apprentices in their art; and, compel the people of the commonwealth to pay for their boots and shoes whatever price this society shall set.

The association is called the Boston Journeymen Boot-makers' Society. (Art. I.)

They have a president, vice president, secretary, treasurer, trustee, a standing committee of five, and a board of judges of three, all to be chosen semi-annually by ballot. (Art. II.) The duties of these officers are particularly described, and serve to show the character of the association.

The standing committee are required to notify all journeymen working in the city, of the existence of the society, and to invite them to join it. (Art. VIII.) In the XIIIth art. it is declared, that any journeyman working in this city, who does not belong to this society, after being notified of the next society meeting, and not joining at that meeting, or at the one following, shall pay a fine of two dollars. How they are to be made to pay it, is provided for by the operation of other articles of the instrument. They expected, in this way, to induce all journeymen, willingly or otherwise, to join this society. In thus combining to compel all the journeymen boot-makers of the city, under a penalty, to become members, they certainly assumed an unlawful control over their fellow craftsmen.

By art. X. it is declared, that all disputes between employers and journeymen, are to be decided by the board of judges; and it is required of the judges to lay their decisions before the society, to be enacted upon as may be thought expedient. Thus, all disputes between journeymen and their employers, are to be decided by judges chosen by the journeymen, from their own body, by themselves, and not in concurrence with employers. But not trusting to these judges, although of their own selection, their decisions, before they are carried into effect, must be referred to the society, to be enacted, not according to any fixed law, but according to their own sense of expediency.

By the Xth art. of that part of the constitution of this commonwealth, which declares the permanent and inalienable rights of the citizens, which even the legislature cannot repeal or infringe, to the detriment of the poorest member of the state, it is declared, "that every individual of this commonwealth has a right to be protected by the government in the enjoyment of his property, according to standing laws." By standing laws is meant, those which are made by the people themselves in the legislature, where every citizen is represented, and has a voice.

The XIth art. of the declaration of rights, says, "that every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his property." But this society of journeymen boot-makers say, in their constitution, that the wrongs of the journeymen received from their employers, and *vice versa*, shall be decided by their board of judges, in the first place, and that the decisions of the board shall be revised by the society according to their sense of expediency.

The XVth art. of the declaration of rights declares, that "in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been other-

ways used and practised, the parties have a right to a trial by jury ; and this method of procedure shall be held sacred." And in the XXIXth art. of that instrument, it is declared " to be the right of every citizen to be tried by judges, as free, impartial, and independent, as the lot of humanity will admit." But you see, that this society of journeymen intend, that their disputes with their employers shall be settled by their own body of judges and by themselves ; not allowing to employers a voice in the matter ; which seems evidently to be a palpable violation of the social principle. They have a right to agree to settle among themselves their own disputes. But they certainly transcend all right, when they assume to settle their disputes with others, not members, by judges of their own choice, and according to their own varying notions of expediency.

You have seen, that this society, by the XIIIth rule, claim to impose a fine on such journeymen as shall not, after notice, become members of their body, as well as on members who shall violate their rules. Their method to compel payment, although most arbitrary, is found effectual, keeping both employers and journeymen, whether members or not, in perpetual alarm. The offending journeyman is, in an indirect but certain manner, to be deprived of his employment, and the employer is to be compelled to dismiss him by the threat of a "strike."

By the 2d sec. of the XIIIth art. " any member suffering himself to be erased from the society books, shall, on his re-entering, pay a fine of one dollar, together with his initiation fee, and all arrearages."

By the XIVth art. " any member working for a society shop, and knowing a journeyman to be at work who is not a member of the society, shall immediately give notice to the other journeymen, who, on receiving such information shall quit working for that shop."

By the 3d sec. of art. XIIth, " the funds of the society may be appropriated to assist any journeyman belonging to the same, who may be ten days on a strike." By a strike is meant, when all the journeymen leave their employer, because he keeps a person in his employment who is not a member.

The funds of the society are made up of the sums paid for admission, for fines, and the monthly contribution. Those who leave their work, and live for ten days without employ for this cause, are to be supported out of this fund, until their employer, urged by the necessity of business, shall dismiss the offender, or *scab*, as he is called in this new vocabulary, and recall them to their work. The marked journeyman is compelled by the urgency of his situation, from loss of employment, to go to the society, and buy his peace, by paying all fines and penalties, and an initiation fee, before he can be restored to his employment, on which he is dependent for bread. Is this the liberty, which the members of this respectable craft are entitled to enjoy by the constitution and laws of this commonwealth ?

The only authority which may rightfully impose a tax, in the shape

of a fine or penalty, or in any other way, must be imparted by the legislature ; it being provided in the XXIIId art. of the declaration of rights, "that no charge, tax, impost or duties ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature."

If the journeymen boot-makers are justified by law, to compel, by this powerful machinery, masters and fellows to submit to the rules of this society, they will probably make new and still more burdensome regulations. But if the journeymen have this right, it will follow, that masters and employers have the same right to associate for their own protection, and to oppress the journeymen in their turn. For the law will extend equal protection to both. It will follow, too, that every other profession, trade, and occupation in the country, will find themselves, at once disfranchised of their ancient, and, as they supposed, well established rights and liberties, and subjected to new, secret, and unknown tribunals, and to varying laws, by which their property will be taken from them against their consent, and without a trial by jury, according to what has hitherto been regarded the constitution and fixed law of the land.

This society claim to interfere with the freedom of the citizen to choose his own pursuit, and to labor according to his own judgment and ability. By the Xth art. of their constitution, it is made the duty of the board of judges, "to determine, when called upon, what journeymen shall work on the first rate of work ; as no journeyman, they say, whose work is of the first rate, or who is able to make it such, shall be allowed to work on the second rate without a vote of the society."

But attending solely to their own interest, "a member may," according to art. XIV., "continue to work in a shop, where one who is not a member is employed, if the number of members is not a majority." That is, as I understand the rule, unless the strike upon the employer can do to him an effectual injury, so as to coerce his submission, the member need not leave his employment. You must, therefore, judge whether these members mean to strike upon a master, unless they can strike to some purpose.

By the XVIIth and last article, a provision is made to perpetuate the existence of the society against their own good sense, and the opinion of the majority of the members, if any five of their number is willing to continue it.

In the defence of these individuals, it has been argued, that this club has done good rather than harm ; and that its tendency has been hitherto, to improve the morals of the members, and to raise the quality of their work. It has been denied, too, that it has in its operation, tended to impoverish masters or oppress journeymen. Upon all these points, there was a full and free examination of witnesses, and it belongs to you to weigh their testimony with discrimination and candor. The question is not, whether the society have used their power to the extent of mischief of which it is capable, but rather, whether they have

not assumed a power not derived from the law, but repugnant to it, which, in the hands of irresponsible persons, is liable to great abuse.

It is undoubtedly part of the freedom of the citizens of this commonwealth to form themselves into societies for any innocent or lawful purpose,—for mutual edification and charity, and for improving their nature and condition. This right has always been exercised without control; and until members shall avail themselves of their organization for some illegal purpose, it cannot be rightfully called in question. There is no doubt, that these defendants and their brother craftsmen may assemble in societies, and discuss the value of their work, and the wages to which they are reasonably entitled for their skill and labor. So long as they shall not assume to restrain the liberty and rights of others, no offence will be done. Let them use their liberty freely, but carefully abstain from infringing the liberty of others.

The associations of members of the legal and medical professions have been relied upon by the counsel for defendants, to justify their union. You must judge how far they are parallel.

From the confidence reposed in lawyers they have great power to do good or evil. The abuse of legal process is the worst species of oppression, as it assumes the guise of law. The object of the association of the bar, in the different counties of this commonwealth, was in aid of the power, which was vested by law in the supreme judicial court, to regulate the admission of attorneys to practice, and to exclude immoral and unqualified persons from the profession. The several associations availed themselves of their right, to estimate the value of professional services. They refused to be concerned in cases, which were not instituted by attorneys, who were of regular standing in the profession. This was evidently beneficial to the community, and lessened litigation, and has tended, without doubt, greatly to elevate the members of the profession in the confidence and esteem of their fellow citizens. You find, however, that after the Revised Statutes went into operation, the bar of this county dissolved their association, by their own consent: and now, although a portion of the members have formed a society for social and benevolent purposes, they have ceased, as a body, to enforce rules restraining the freedom of practice, or to interfere in anywise with the right of individual citizens to engage in the profession.

The members of the medical profession in this city have formed a voluntary society, for mutual improvement in the healing art, and for social and benevolent purposes. They have rules regulating their professional practice and meetings, but without undertaking to impose fines or penalties. It is the intercourse of scholars and gentlemen, studious to promote each others professional and moral welfare. They claim, likewise, to select their own companions, and to hold no fellowship with quacks. When the records of these associations were called for by the defendants, and laid before you, by consent, and without question of right, you will judge, if anything was discovered

in them inconsistent with the rights of others, or injurious to the welfare of the community.

I have made these remarks, although I think you were sensible, that the members of these professions were not accused of any offence, or present to defend themselves, had their rights been invaded.

This case is as important in principle as any one which was ever tried in this court. I think, that we have all attended to it with diligence, and without prejudice I am of opinion, and it is my duty to instruct you as matter of law, that this society of journeymen bootmakers, thus organized, for the purposes described in the indictment, is an unlawful conspiracy against the laws of this commonwealth. It is a new power in the state, unknown to its constitution and laws, and subversive of their equal spirit. If such associations should be organized and carried into operation through the varying grades, professions, and pursuits of the people of this commonwealth, all industry and enterprise would be suspended, and all property would become insecure. It would involve in one common, fatal ruin both laborer and employer, and the rich as well as the poor. It would tend directly to array them against each other, and to convulse the social system to its centre. Nothing but the force of government can put down a general spirit of misrule. But what could be hoped from the interference of government, when every citizens would be engaged in this civil strife? A frightful despotism would soon be erected on the ruins of this once free and happy commonwealth.

With these views of the nature and tendency of such private, voluntary associations as the present, I cannot do otherwise than to instruct you, that if the evidence satisfies you, that these defendants, or any of them, have confederated together for the unlawful purposes which are charged in this indictment, you will, according to your oaths, find them guilty, and leave them to the judgment of the law.

The jury found all the defendants guilty. A bill of exceptions was subsequently tendered and allowed, and will be argued at the next March term of the supreme judicial court.

Court of General Sessions, Philadelphia, November 14, 1840.

COMMONWEALTH, EX RELATIONE D'HAUTEVILLE, v. SEARS AND OTHERS.

It seems, that a wife may refuse to cohabit with her husband, for misconduct on his part, which will not furnish good legal grounds for a divorce.

Where there are differences between parents, and they do not live together, the right of the father to the custody of the children is not absolute, but depends upon the sound discretion of the court; and this, although the wife has left the husband for no reason which would be a sufficient ground for a divorce, and his conduct is unexceptionable in every respect Held, under the circumstances of the present case, that the child shall remain in the custody of the mother.

THIS was a habeas corpus for the body of Frederic Sears Grand

D'Hauteville. The facts of the case sufficiently appear in the opinion of the court, which was delivered by

BARTON, President Judge.—In this case the writ of habeas corpus was issued at the instance of Gonsalve Grand D'Hauteville, directed to Ellen his wife, and to David and Miriam C. Sears, her parents, commanding them to have before the court the body of Frederick, the infant son of petitioner and the said Ellen.

In the petition upon which the writ was issued, Mr D'Hauteville set forth that he was a citizen of the Canton de Vaud, in Switzerland; and that he was married in the church of Montreux, in the said canton, and according to its laws, on the 22d of August, 1837, to Ellen Sears, whose father was then a citizen of Massachusetts, in the United States. That in the early part of 1838, his wife, with his consent, came to Boston on a temporary visit; and has since, without any just cause known to the petitioner, refused to return to him, or has been prevented from doing so, and that on the 27th of September following, she gave birth to the child whose custody he now claims. Mr D'Hauteville adds, that he arrived in the United States in July, 1839, and has ever since been engaged in a fruitless attempt to recover his wife and child, the latter of whom has been restrained of its liberty by its mother and her parents, and detained by them in this country against his consent and permission.

To the writ of habeas corpus, Mr and Mrs Sears severally returned, that the said child was not in their custody, which they did not claim, and never had claimed. That the child and its mother were, and for some time had been living with them, or one of them, for comfort and protection, which she (their daughter) entirely merited, and would continue to receive, while it should be in their power to give it.

Mrs D'Hauteville makes return, that she is possessed of the custody of her child; that, as the mother, she claims and is entitled to such custody, for the proper and necessary purposes of its care and guardianship, and for no other purpose; and that he is in no respect restrained of his liberty, or detained illegally. That his moral and religious education is, and will continue to be, suitably attended to; that, in her own separate right, she is possessed of ample means for its suitable support and education; and that its age does not admit of its separation from her without the greatest danger to its health, and even of its life, which has been more than once severely threatened by attacks of illness. Mrs D'Hauteville further avers, that she has left her husband, and is compelled to continue in a state of separation from him, in consequence of 'a variety of circumstances,' some of which are specified in her return, and others more particularly detailed in her further return—but all based upon an alleged total failure of the husband to realize the expectations of sympathy and affection which he had excited previous to obtaining her consent of marriage, and a course of conduct towards herself and mother which had rendered her 'inexpressibly wretched,' and finally induced the conviction 'that there was to be no mitigation of her sufferings while she continued in his society,

and under his constraint.' Mrs D'Hauteville adds, that 'her parents have, at her request, considered the causes of this separation, and given it their entire sanction and approval.'

In the suggestion and further suggestion filed by Mr D'Hauteville, 'he denies, utterly and unreservedly, any just cause for separation, and any consciousness on his part of any matter or design other than an affectionate husband should conceive; nor is he aware, nor has he ever been aware, of any reason other than such as arises from the course his misguided wife has, by unhappy counsels, been led to pursue, which could exist for the interruption of their peace and comfort. Throughout the whole of the voluminous writings filed by the relator in reply to those submitted by his wife, he breathes the most anxious desire for her to return to his home and society.

In the delicate and unhappy issue thus presented for our decision, whatever fault or blame may attach to the separation, is visited by each upon the other; nor does the relator hesitate to charge, on every occasion, and in almost every variety of shape, upon the mother of his wife, the chief agency in sowing the seed which has since ripened into so baneful a harvest of dissention.

We would gladly avoid the necessity of a recurrence to the conflicting statements and accusations of the parties, by deciding this case with exclusive reference to the legal principles which it involves; but the parties have so elaborately entered into these details, and, by one side at least, have we been so earnestly invoked to an expression of the opinions to which the testimony has conducted us, that, while forbearing to enter into minuteness of detail, which neither the occasion calls for, nor the necessities of the case demand, we do not believe we can properly avoid such an expression of our views as these considerations may seem entitled to require. We do so with the less reluctance, when recalling to mind the many unfounded rumors, painful to the feelings, and injurious to the reputation of the mother of the respondent, which have grown out of the various charges preferred against her by the relator—rumors in harmony with his allegations that by her hand have been poisoned and sped the arrows which have pierced their affections and destroyed their happiness. It is due to the cause of truth and to the reputation of a traduced and much wronged lady, that these erroneous impressions shall be dispelled.

However strong the allegations which, in his pleadings, have been made by the relator against Mrs Sears—however numerous his intimations that to her evil influences alone upon the mind of her daughter have been owing the deplorable results which have led to this issue—we are bound to say that he has utterly failed to establish the truth of what he has thus alleged or intimated, and that all the testimony has led to conclusions of the most widely opposite character. So far from having interfered to sap the affections of kindred hearts, or weaken the reciprocal confidence of husband and wife, the proofs have placed Mrs Sears in the attitude of a peacemaker, from the first moment of dissension to the final separation at Havre; of a parent,

anxiously striving to soothe the incidental irritations of those in whose fate she had so much reason to be deeply interested—of an amiable lady, yielding every consideration of mere self to the promotion of the comfort of those around her; and submitting, for her daughter's sake, in a foreign land, and in the absence of her husband, to the apparently studied coldness, and at times positive rudeness, of him whom she had every claim, alike as his guest and the mother of his newly made bride, with a forbearance and dignity which have commanded the entire regard of the court. We will not consume time by attempting any analysis of the voluminous testimony which has been given; but notice merely the conclusions which it has induced.

In reference to the evils preceding the ill-starred marriage of the parties, or which marked the ruffled term of their brief marriage life, we desire to say as little as possible. That the relator's hand was originally accepted by the respondent, under the mistaken feeling that she had given him an encourgement which did not warrant a rejection with honor, is to my mind plain; and when, for the purpose of consummating the marriage, the family left Paris for Vevay, every attempt to disguise it would be useless, that her heart throbbed with far different emotions than those which a devoted female may be usually supposed to approach the bridal altar. In the language of Mr Sears, 'it was a melancholy drive to us all—more like going to a funeral than a wedding.'

It is abundantly established by the evidence, that prior to her marriage with the relator, the respondent was of an uncommonly happy temper and cheerful disposition. A sad change soon ensued. Her cheerfulness disappeared; her spirits became dejected and broken; and pallid cheeks and swollen eyes took the place of the smiles which had formerly lighted up her countenance. This change is admitted by the relator in the pleadings; and it is attributed by him to causes which are not sustained by the proofs of the case. We are compelled to say, that they can be justly chargeable alone to the singularly mistaken course of policy which he thought proper to pursue towards the respondent and her mother.

We forbear to describe these domestic difficulties, and will only say that the occurrences at Hauteville, at Geneva, and perhaps still more at Paris, were but too well calculated to produce the effect which ultimately they did produce, that of a total estrangement of affection. It is not our province to say whether the conduct of Mr D'Hauteville was such as to justify his wife in taking the step of final separation; our decision must refer alone to the question, who is entitled to the custody of the child.

At the same time, we are very far from agreeing with the counsel for the relator, that nothing can justify a wife in taking the step of final separation, but such misconduct on the part of the husband as would furnish good legal grounds for divorce. The husband may stop far short of the misconduct contemplated by the act of assembly;—and yet may offer such indignities to his wife, 'as to render her condition

intolerable, and life burdensome.' He may 'force her to withdraw from his home and family,' even though he may not have crossed the defined line which divides the boundaries of moral from those of technical ground of separation. 'That moral tyranny,' so happily described by the father of the respondent in one of his letters, 'which strikes its blows upon the mind till it totters,' may rule with despot sway, until the iron shall as effectually have entered the soul as if the hand of unmanly violence had outraged the person of the wife.

On the part of the relator, it is contended that the custody of the child is the vested and absolute right of the father; one of which he cannot be deprived, excepting where it becomes forfeited either by his unfitness to take charge of its morals and interests, or by such misconduct as would afford good ground for a divorce *a vinculo matrimonii*.

We cannot subscribe to the correctness of this doctrine. After an investigation of the authorities, and the most careful reflection which we have had it in our power to give to this deeply interesting and important subject, we have been unable to convince ourselves of the justice of what is thus contended for, or to become possessed of any decision, English or American, by which it is supported. If it be the law either of nature or of the land, then have those courts most grievously erred, by whose decisions have been so repeatedly denied the claims of the father, or supported those of the mother, in cases in which the moral character of the former was never attempted to be impeached, nor his fitness to retain the custody called into question. In the case of the *Commonwealth v. Briggs*, (16 Pickering, 203,) it is indeed said, that the only cases 'in which the court would not interfere in favor of the father, to take the child from any safe custody to deliver it to him,' would be 'where he is a vagabond, and apparently unable to provide for the safety and wants of the child.' And in a succeeding sentence it is said, 'the court will feel *bound* to restore the custody, where the law has placed it, with the father, unless in a clear and strong case of unfitness on his part to have such custody.' But notwithstanding this seemingly unqualified assertion of the paternal right, a preceding portion of the same decision subscribes to the doctrine so generally received, that in deciding the case of 'a child of tender years, the good of the child is to be regarded as the predominant consideration'—a consideration in which, surely, are not necessarily involved the misconduct or unfitness of the father, as we shall have occasion hereafter to show.

In every case cited by either side, with the equivocal exception of the *King v. Smith*, (2 Strange, 982,) in which the judgment of the court is pronounced in terms which leave it somewhat ambiguous whether the right of disposing of the custody of the infant by the court, is admitted or denied, it is expressly laid down, that such custody is always within the discretion of the court—a discretion to be exercised by the particular circumstances of every case. In the case of the *King v. Delaval*, (3 Burrow, 1436,) Lord Mansfield says 'that in cases

of writs of habeas corpus, directed to bring up infants, the court is bound, *ex debeto justitiæ*, to set the infant free from an improper restraint ; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them.'

All the American cases, without a single exception, which have been cited for the relator, recognize, to its fullest extent, the principle upon which, in the case of the *Commonwealth v. Addicks and wife*, (5 Binney, 520,) Chief Justice Tillingham refused to take children from the mother, and remove them to the custody of their father, viz. the discretion of the court, to be recognized according to the particular circumstances of every case. In New York, where the decisions are conflicting to this extent, that in some cases the custody is taken from the mother and given to the father, and that in others his claim is denied, they are all based upon the exercise of such discretion, so regulated. In nó case has any court or judge strained the mark so far as to lay down the bald, broad *dictum*, that the father's right of custody is absolute and inalienable ; but all agree that while, in general, he has such right, circumstances may arise by which he may be deprived of it. Some of the cases, to a certain extent, sustain the counsel for the relator in the very strong ground which they have assumed, that such right can become forfeited only by misconduct, which would afford good ground for divorce. But the bulk of the cases embraces broader grounds ; and an examination of even those which at the first blush seem to support this doctrine, manifests that they furnish no foundation upon which to really rest the structure of argument attempted to be based upon them. Thus, in the case of the *People v. Nickerson*, (19 Wendell, 16,) one in which great confidence appears to be reposed by the relator, while the court repeats the principle 'that the father is the natural guardian of his infant children,' it admits its right to transfer the custody to the mother whenever it would be 'for the interests of the child, pecuniarily or otherwise.' In the *matter of Mitchell*, (R. M. Carlton's Reports, 489,) another case cited for the relator with great confidence, this principle is again recognized in the following terms:—'The cases assert that the court is not bound to deliver the infant over to any particular person ; that it is not a matter of right which the father can claim at the hands of the court, but a matter resting in the sound discretion of the court, to be guided by the interests of the child. And it is most proper that this discretion should be exercised by the court, when the infant is too young to make a proper selection.' And even in the apparently strongest of the relator's cases, that of the *Commonwealth v. Briggs*, it is stated, that 'as a general rule, the writ of habeas corpus, and all action upon it, are governed by the judicial discretion of the court, in directing which, all the circumstances are to be taken into consideration. In other cases, in which the father's petition was rejected, the language of the court is equally decided. In that of *Margaret Eliza Waldron*, (13 Johnson's Reports, 418,) it is said that the delivery of

the infant to any particular person 'must be left to the discretion of the court, according to the circumstances that shall appear before them. The case of the *Commonwealth v. Addicks and wife*, is very much in point, and a strong corroboration of the principle that it is a matter resting in the discretion of the court, and not matter of right, which the father can claim at the hands of the court.' That of the *State v. Smith*, (6 Greenleaf, 463,) is precisely to the same point; and in the case of *The United States v. Green*, (3 Mason, 482,) the language of Judge Story is most unequivocal:—'It is an entire mistake to suppose that the court is at all events bound to deliver over the infant to its father, or that the latter has an absolute vested right in the custody.' The unpublished South Carolina case of the *State v. Nelson and others*, the manuscript of which has been received since the close of the arguments in this, and which, by the consent of the respondent's counsel, has been placed by the counsel for the relator in our hands, gives the child to the father, and decides in favor of his right, in the following exceeding strong terms: 'I must say that I have come to the conclusion that there is no principle of law or rule of decision which ought to interfere with the father's right, in a case where there is no depravity of character, no general want of moral principle, no want of ability to support with comfort, no incapacity, no unwillingness to educate virtuously and properly.' But at the same time, the decision clearly recognizes the discretionary power of the court to regulate the custody; and, as it approaches a close, widens the grounds within which, in the paragraph just cited, are circumscribed the forfeiture of the paternal claim, by a deduction from the testimony upon which the decision is based, that nothing had been shown to prove that it was not for the interest of the two children to continue with their father, or that their interests would be promoted by remaining with their mother—thus, in effect, and almost in terms, recognizing the principle in the case of *Addicks and wife*.

The latest case in date, is that of *Barry v. Mercein*, which, in various modifications of shape, has been, between May, 1839, and the 21st of October, 1840, acted upon by no fewer than four different tribunals of the city and state of New York. It appears to have been originally presented to the recorder of the city, who decided against the claim of Mr Barry, because, in his opinion, the mother's custody was the most beneficial for the interests of the child. Mr Barry's next application was to the chancellor, who, in a long and elaborate opinion, refused to interfere with the mother's custody, principally upon the ground that it was of an age too tender to be deprived of the maternal care. The application was renewed to Judge Inglis, one of the judges of the court of sessions, who also decided against the relator, chiefly on the ground of *res adjudicata*; but who says expressly, in the manuscript opinion or letter addressed to Mr M'Keon, and which has been read to the court, that 'independently of the question of *res adjudicata*, I should have had no hesitation in deciding the question as I did, in favor of the mother.' The perseverance or affection of

Mr Barry directed an application to the supreme court for a reversal of the proceedings of Judge Inglis—from which tribunal he has been fortunate enough to obtain, at length, a favorable decision, based upon various considerations. But this decision of the supreme court of New York, like that of every other to which reference has been made, while it admits the better title of the father, denies his absolute right, and refers the disposition of the infant's custody to the discretion of the court, to be exercised by a proper regard for its welfare.

The principle, then, upon which the *Addicks Case* was decided—a decision which one of the counsel for the relator considered a judicial anomaly, and earnestly invoked this court to disregard it, to 'ride over it, and to ride it down'—did not originate with Chief Justice Tilghman; he had followed in the tracks which both foreign and American judges had imprinted; and the safety and wisdom of the path have been recognized by all Judges who have followed *him*. Whether, under the very peculiar 'circumstances' of that case, judge Tilghman exercised his 'discretion' in the manner which was really most likely to be for the best interests of the children, is not so clear; but certain it is, that, notwithstanding the wife was an adultress, divorced from her husband, and then living in a state of semi-legalized prostitution with her paramour, with whom she had contracted a marriage in despite of the prohibitory statute of the 17th of September, 1785—and although one of the children was ten and the other seven years old, he refused to take them from her, because 'it appeared that, considering their tender age, they stood in need of that kind of assistance which could be afforded by none so well as a mother.' And when, nearly three years after, the several parties were again brought before him, to have the same question re-determined, (2 Sergeant and Rawle, 174,) he transferred the custody of the children to the father, not because a new light had dawned upon his mind, dispelling the darkness of the past, and revealing the absolute paternal right, but only because 'the children did not stand before the court in the same situation as formerly,' because they had arrived at an age when their morals would inevitably become tainted by their mother's evil example. In the latter decision, Chief Justice Tilghman declares it to be the *settled law* of Pennsylvania, that the custody of the child is always to be regulated by judicial discretion, exercised in accordance with what may seem for its best interests. Referring to the former case, he says, 'the law was, at that time, fully considered and declared by the court.'

Having thus arrived at the conclusion that the right of the father is not absolute, and that the custody of the infant is exclusively referrable to sound judicial discretion, I proceed to inquire in what manner the circumstances of this case and the interests of the child demand that that discretion shall be exercised. I take pleasure in saying, that whatever may be the faults of temper which the conduct of the relator to his wife and to her mother has developed, not the shadow of stain can be found upon his moral reputation. Apart from his somewhat Asiatic notions of a husband's rights and wife's duties, and his conjugal

misunderstandings and unprovoked treatment of Mrs Sears, no evidence has been adduced or attempted which affixes the slightest reproach to his conduct or character as a good citizen; on the contrary, he has been shown to be habitually observant of all the proprieties of life, temperate and domestic in his habits, and apparently attached to the requirements of religion. However his treatment of Mrs D'Hauteville and her mother may have justified her severance of the matrimonial tie, I can find nothing of that kind of 'misconduct' of which the law speaks, which would justly serve to deprive him of the custody of his son; or do I question either his ability or inclination to rear it with a proper regard to its intellect and morals. It must be on other grounds that an adverse decision can be framed. It is proper to say, too, that the testimony upon which we have built the favorable opinion thus expressed of the reputation and generally good conduct of the relator, has principally proceeded from the camp of the opposing party. Mrs Sears has not hesitated, despite of the legally hostile attitude in which unhappy circumstances have placed her, to pay a proper tribute to whatever qualities of excellence he may possess; and has answered every question upon the subject with her accustomed frankness.

I repeat that, if the father's right of custody could be forfeited only by immoral conduct or character, or by his unfitness to superintend the moral and intellectual culture of his child, there has been nothing developed in the present case which could properly interpose to take away from him that right. But I cannot believe that the exceptions to such right are circumscribed within so limited a circle—a belief which would be in the face of nearly every decision cited as well for the relator as by the other side. The reputation of a father may be stainless as crystal; he may not be afflicted with the slightest mental, moral, or physical disqualification from superintending the general welfare of the infant; the mother may have separated from him without the shadow of a pretence of justification;—and yet the interests of the child may imperatively demand the denial of the father's right, and its continuance with the mother. This is far less than what was decided in the Addicks case—although, as we have already intimated, the proper disposition of custody there made, (apart from the soundness of the principle) might possibly be questioned.

Thus, in the case of the *People v. Nickerson*, it is assigned as one of the reasons for delivering the child to the father, 'that nothing appeared which could justify the conclusion that the father was not a fit and proper person to have the care and education of the child, *or that it would be for the interests of the child, pecuniarily or otherwise*, to commit it to the custody of the mother.' It is unnecessary to say to what conclusions the testimony in this case has conducted us in regard to the 'pecuniary interests' of the child; because, although that consideration might very properly form an element of our decision, and, independently of the case just referred to, is recognized as such by other of the relator's cases, it has not been pressed upon us, or even

referred to, by either of the parties here; and it is fortunately in our power to reach a decision framed on a more elevated basis than that which a calculation of probable future differences as to dollars and cents would afford.

The pecuniary means of the respondent to properly attend to the education and interests of the child, are beyond all doubt; her maternal affection is intensely strong; her moral reputation is wholly unblemished, and, under these admitted or established facts, the circumstances of this case render her custody the only one consistent with the present welfare of her son.

The tender age and precarious state of its health, make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best *substitute* which could be procured, every instinct of humanity unerringly proclaims that *no* substitute can supply the place of HER whose watchfulness over the sleeping cradle or waking moments of her offspring, is prompted by deeper and holier feelings than the most liberal allowance of a nurse's wages could possibly stimulate. Not yet two years of age when the writ of habeas corpus was issued, the child has already been the subject of several distressing maladies, and has been apparently threatened with others of not inferior aggravation. A portion of the deposition of Dr Warren relates to this matter: and Doctors Meigs and Chapman, physicians of the most distinguished skill and reputation, and whom we name in the order in which they have been examined, have testified in open court.

According to the testimony of the first named of these gentlemen, the child has been sickly almost from the period of its birth. He saw it a few days after; at first, it appeared in good health, but was soon attacked with a complaint which nearly proved fatal—so severely attacked, that 'the grandmother had given the child up.' Having recovered from this, it was soon after attacked with another complaint, 'which proved very obstinate and required change of air and place, and a long continuance of powerful remedies, which succeeded ultimately in removing the disease and restoring the child to health.' Dr Warren adds, 'the child is decidedly not of age to be separated from its mother.' Dr Meigs, who was called in to consult with Dr Chapman, and who has seen the child since the institution of this proceeding, gives his opinion, as a medical man, that the 'chances of rearing the child would be diminished by removing it from its mother;' says that it is at present in bad health; afflicted with a distressing and dangerous calculatory disorder—in addition to which, it is the subject of asthmatic attacks, and that he has seen it laboring under a very dangerous paroxysm of asthma. The latter of these complaints, the witness testifies, would render Switzerland particularly unsuitable as a place of residence for the child, on account of its mountainous character and variable temperature. Dr Chapman, who has been its constant medical attendant since its removal to Philadelphia, and who has visited it repeatedly, fully confirms the statement of Dr Meigs, and

agrees with him as to the pernicious and aggravating effect which a residence in Switzerland would be likely to have upon the maladies to which it is unhappily subjected. He regards it as being of a feeble constitution, 'laboring under positive disease,' and indispensably requiring all the care and attention of its mother. These gentlemen also agree in opinion, that the climate and water of Philadelphia are especially favorable to the amelioration of diseases of the character with which this boy is afflicted.

The vigilance of the mother appears to have been untiring. Dr Warren says 'her attentions to the child were remarkable. They exhibited a degree of affection and devotion on the part of the mother, which I have not seen exceeded.' In another part of his deposition, he says, "since the birth of her child, Mrs D'Hauteville has been exclusively attached to it. She has not gone into society at all—not in a single instance, so far as I know.' The testimony of Drs Meigs and Chapman, though not in equally strong terms, is of a similar character.

It is not possible to imagine, for a single moment, even did the relator intend to make Philadelphia permanently his abode, that he could succeed in procuring a sufficient substitute for the maternal care which the frail constitution and feeble health of his son must incessantly require. But such is not his intention: he claims the custody of the child with the avowed purpose of immediately removing it to the uncongenial climate of Switzerland.

Upon the question of *Citizenship*, which has been so elaborately argued, we have come to the conclusion that any expression of opinion would be premature. It is not in the slightest degree called for by the necessities of the case; and would be anticipating a question of the most singular interest and importance, which may be raised hereafter, here, or elsewhere. Our decision can properly refer only to *the present custody* of the child: and it is that he be remanded to the custody his mother.

Should the father remain in America, or at any time revisit this country, we cannot doubt that every reasonable facility of access to his child will, at all proper times, be afforded to him by the respondent and her parents, should she continue to reside with them. It would seem to be his right—one which possibly he could not enforce by legal proceedings, but of which we cannot apprehend the slightest disposition to deprive him—to exercise, through the medium of some proper agent, a share of tutelage and superintendence of the education of the child or an agent who could see the child from time to time, and communicate with him in regard to its health and discipline.

Decree.—And now, November 14, 1840, this cause having been heard upon the returns and amended return, suggestions and further suggestions filed by the respective parties, and remaining of record, and upon the evidence written and oral adduced before the court, it is considered that the within named infant, Frederick Sears Grand D'Hauteville is not unlawfully restrained of his liberty or detained by the parties

to whom the within writ is directed, or any or either of them, and that the said infant be remanded and restored to his mother, Ellen Sears Grand D'Hauteville, in the said writ named.

J. R. Ingersoll, W. B. Reed and *Scott* for the relator.

Meredith, Binney and *Cadwalader*, for the respondents.

Supreme Court, New York, October Term, 1840.

THE PEOPLE, EX RELATIONE BARRY, V. MERCEIN.

The father is entitled to the custody of his infant children, and where differences exist between the parents, the right of the father is preferred to that of the mother; but he may forfeit it by misconduct or lose it by misfortune, if he want either the capacity or the means for the proper training of the children according to their circumstances or expectations in life.

When the father has forfeited his right to the custody of his children, the court, in its discretion, may place them in the custody of the mother or some other person; but the claim of the father is always preferred until it plainly appear that the interest of the children require it to be set aside.

In considering this point, the court will have nothing to do with the differences between the parents, any farther than they affect their qualifications for the proper exercise of the parental office.

It seems, that it is not a valid objection to the claim of a father to the custody of his infant child, that he is a foreigner and intends to remove the child out of the country.

An agreement between husband and wife providing among other things for a future separation, is illegal. Whether an agreement, based on the voluntary separation of husband and wife, is void, *quære*.

Upon a *habeas corpus* for the body of an infant, the question is not, whether the child is actually suffering under duress of imprisonment; but whether there is that restraint which defeats the rights of the relator.

Differences between husband and wife which do not amount to such acts as authorize a legal separation, are not proper subjects of judicial inquiry.

Upon a common law *certiorari* the court cannot go beyond a reversal of the former proceedings; and they will, ordinarily, consider the record only, and not the evidence.

THIS was a habeas corpus for the body of the infant daughter of the relator. The wife of the relator refused to cohabit with her husband, and went to her father's, the respondent's, house with her infant daughter. The case has been before four different tribunals in New York. It was originally presented to the recorder, who decided against the claim of the relator because, in his opinion, the mother's custody was most beneficial for the interests of the child. Mr Barry's next application was to the chancellor, who in a long and elaborate opinion, refused to interfere with the mother's custody, principally upon the ground that the child was too young to be deprived of the maternal care. The application was renewed to Judge Inglis, one of the Judges of the court of sessions, who also decided against the relator, chiefly on the ground of *res adjudicata*. The case came before this court on a petition for a writ of certiorari.

BRONSON J. in delivering the opinion of the court, said, that nothing which fell from the respondent's counsel had shaken the opinion they had heretofore expressed, that in these unhappy controversies between husband and wife, the former, if he chose to assert his right, had the better title to the custody of their minor children. The law regarded him as the head of the family; obliged him to provide for its wants; and committed the children to his charge, in preference to the claims of the mother or any other person. *The People v. Chegaray*, (18 Wendell, 637.) *The People, ex relat. Nickerson*, (19 Wendell, 16,) and cases cited; *The King v. Greenhill*, (4. Adolph, and Ellis, 624;) *The King v. Isley*, (5 id. 441.) In cases of voluntary separation between husband and wife, there must of necessity be some legal rule in relation to the custody of their minor children. Without it, the matter would probably be determined by force. This would be likely to widen the breach between the parties. And if it did not endanger the personal safety of the children, it could hardly fail to alienate their affections from one or both of the contending parents. Whether the common law had given a just and proper rule, or whether a better might not be devised, were questions which did not address themselves to the consideration of the court.

The right of the father might be forfeited by misconduct, or lost by misfortune; and when he attempted to assert it by habeas corpus, the court exercised a discretion, having regard to the welfare of the children, and might leave them in the custody of the mother or some other person, in preference to the claims of the father. *Matter of Mc Dowles*, (8 John. 328;) *Matter of Waldron*, (13 John. 418;) *Matter of Wollstoncraft*, (4 John. Ch. Rep. 80.) But this was not an arbitrary discretion, or a license to do what they pleased in relation to the custody. On the contrary, it was well settled, that in the absence of any positive disqualification on the part of the father for the proper discharge of his parental duties, and when there is no other special reason touching the welfare of the children, for preferring the mother, the father had a paramount right to the custody, which no court was at liberty to disregard.

In taking into consideration the probable welfare of the children, they did not presume, without proof, that it would be best promoted by preferring the mother. The law had settled that question the other way, by preferring the father. His claim could not be set aside upon light grounds, or upon mere conjecture that the interests of the children required it. He must be chargeable with such grossly immoral conduct as showed him plainly disqualified for the proper discharge of parental duties; or else it must appear, that, in consequence of disease, or some other misfortune, he wanted either the capacity or the means for the proper training of the children according to their circumstances and expectations in life. And whatever might be the objections to the father, they could not prevail, if the same objections or others of the like magnitude, could be urged against the mother. In short, the claim

of the father was preferred, until it plainly appeared that the interests of the children required it to be set aside.

In settling the question of custody, they had nothing to do with the causes which led to the separation of the husband and wife except as those causes affected personal character, and touched the qualifications of the parties for the proper exercise of the parental office. If they went beyond that, they violate a principle which lay at the foundation of the whole matter, by overlooking the welfare of the children for the purpose of punishing one of their parents.

The facts relied upon by the respondent were then considered. Apart from certain affidavits of Mrs Barry, the court did not see a particle of evidence going to impeach the relator's right to the custody of the child. And in relation to these affidavits, there were various objections to receiving them at all, notwithstanding the case of *The People v. Chegaray*, (18 Wendell, 637.) But even these affidavits did not make out a case strong enough to warrant the court in depriving the husband of his right; and from the rebutting evidence it appeared, that the wife was as much in fault as her husband; and although she had cause of complaint against her husband, there was no reason to doubt that he was as well qualified as she was, for the proper discharge of parental duties. That was enough to settle the question of custody in his favor—especially in a case where it did not appear that the child had any expectation in the way of property or advancement on the part of the mother, which would be lost by yielding to the claim of the father.

Had Mrs Barry been able to charge her husband with some of those grossly immoral acts which authorized divorce, either absolute or limited, it would not necessarily follow, that she was entitled to the custody of the child. The husband might be in fault in relation to his conjugal duties, and still it might be quite clear, that the welfare of the children, which was the controlling consideration, would be best promoted by committing them to the custody of the father. But Mrs Barry had no such heavy accusations to bring against her husband. She relied on a highly wrought picture of their family jars, in which it was very probable there were faults upon both sides: and which, in any point of view, did not form a proper subject for judicial inquiry. They could not go beyond such acts as authorised a legal separation, 2. R. S. 144, Art. iii. iv. Those were matters which admitted of trial; courts and juries could inquire into them with a reasonable prospect of arriving at truth. But most of the many little things which went to make up the happiness or misery of married life, were of such a nature, that they did not admit of any satisfactory judicial investigation. On this branch of the case, they thought there was nothing which had any legal tendency to control the relator's right to the custody of the child.

The court then considered the fact that Mr Barry is a subject of the Queen of Great Britain, and will probably remove the child to his residence in Nova Scotia. This, they said, was not a valid objection to

his claim, and reference was made to the case of the *King v. De Manneville*, (5 East, 220,) where the mother and child were English subjects and the father was an *alien enemy*.

It had been argued, that the relator was concluded from demanding the child by an agreement, made June 7, 1838. But this agreement was void on several grounds. Although the respondent was named in, and had affixed his seal to, the instrument, he was not a party to it, for any practical purpose. There was no covenant by or with him. There was neither trust nor trustee. It was simply a covenant between husband and wife who were not competent to contract with each other. There was no consideration for the relator's covenant. No one agreed to indemnify him against the maintenance of the child, which was to be left with the mother. And finally, the deed was made to provide for a future separation between the parties, which the law will not sanction. *Carson v. Murray*, (3 Paige, 483) ; *Rogers v. Rogers*, (4 id. 516) ; *Hindley v. Westmeath*, (6 Barn. & Cresw. 200) ; *Westmeath v. Westmeath*, (1 Dow Parl. Rep. N. S. 519.) It was well worthy of consideration, whether all agreements, based on the voluntary separation of husband and wife, are not contrary to law and absolutely void. But is was enough that this is clearly an illegal covenant.

The next question in the case related to the prior proceedings before the recorder of New York and chancellor, and the court were clearly of opinion, that the relator was not concluded by the prior proceedings. The recorder did not profess to make any final disposition of the matter. The chancellor passed upon two questions ; *first*, that 'the said infant daughter was not improperly restrained of her liberty by the said Thomas R. Mercein' ; and *second*, that 'no good reason now exists for taking the said infant from its said mother.'

In regard to the first point, the question here was not whether the child was actually suffering under duress of imprisonment ; but, whether there was that kind of restraint which defeated the right of the father. The respondent, having the child under his roof, positively forbad the father to enter the house, except upon terms which a proper self-respect made inadmissible ; but if he could submit to the terms, he only had a license to enter the house 'to *see* Mary :' not for the purpose of taking her under his care and protection. It was impossible to deny that this was such a restraint as defeated the right of the father to the custody of his child ; and laid a proper foundation for asking redress by habeas corpus. These facts did not exist at the time the chancellor's order was made. And his judgment, that there was no improper restraint on the 26th of August, could not conclude the relator as to matters which had transpired since that time.

The other point decided by the chancellor obviously was not a *final* judgment upon the rights of the parents. But the relator could not be concluded by the former proceedings, because the petition for the habeas corpus and the other papers before the chancellor and recorder were not given in evidence before Judge Inglis. Estoppels were not

favored in law, and he who set them up must show not only that the *same matter* was adjudged, but that it was *directly in question*. *Duchess of Kingston's case*, (20 How. St. Trials, 538); *Outram v. Morewood*, (3 East, 346); 1 Phil. Ev. 334; Cow. & Hill's notes to Phil. 1003–4.

The result was, that the judge erred in the disposition which he made of this case. He should have made an order committing the child to the care and custody of the relator. The judge exercised a common law, not a statute authority when he issued the habeas corpus. The proceedings were consequently before this court on a common law certiorari, which removed nothing but the record. In such cases, although evidence might be returned, the court could not look into it.

This point had often been adjudged, and the disposition which the court felt to examine the case in the most favorable point of view for the wife, and which had led them to consider the evidence, must not be drawn into precedent hereafter. Looking only at the *record*, which in this case consisted of the petition of the relator for the habeas corpus, the writ issued, the respondent's return to it, and the judgment rendered thereon, the court had nothing but the naked case of a father demanding his child—the respondent admitting the child to be in his custody, and showing no good reason whatever for continuing the restraint; and yet judgment had been rendered against the father. In this, there was manifest error.

The court could not, upon certiorari, go beyond a reversal of the proceedings; and they must leave the relator, if he should be so advised, to apply for a habeas corpus, for the purpose of giving effect to their judgment.

INTELLIGENCE AND MISCELLANY.

CAMBRIDGE LAW SCHOOL.—By the late catalogue of this school, it appears, that the present number of students is ninety nine, and we believe three more have become connected with it since the catalogue was printed; making the whole number one hundred and two. Of the names of the gentlemen on the catalogue, it appears, that considerably more than one half of them came from places out of Massachusetts. There are from Maine 10; New York 7; New Hampshire 7; Rhode Island 7; Georgia and Alabama 4 each; Virginia 5; New Jersey, Ohio, Indiana and Pennsylvania, 2 each; Vermont, Connecticut, South Carolina, Illinois, Maryland, Tennessee, Mississippi, Louisiana and Lower Canada, 1 each. We are surprised that the comparative number of students in the Junior class is not greater than it is. It is certainly desirable, that they should enter the school at the beginning of their studies, rather than at a later period. It is often thought to be very necessary for a student to know something of the practice of law before he begins upon the theory, but it is surely best to begin the study of any science in a regular, systematic manner, under suitable instructors; and the practice will take care of itself in due time. Young lawyers now-a-days are not so

overwhelmed with business, on being admitted to the bar, that they cannot learn practice as it comes along. At any rate, the last year of the three spent in an office is better than the first. The practice which young lawyers obtain for many years is apt to be somewhat of a mechanical business, but Law as a science, is quite another matter, and may well occupy the first, and for a while, the only place in the student's mind. There is some false pride in not being able to attend to all the minutiæ of an office at first, but it is better to be unable to tax a bill of costs correctly without assistance, than to be ignorant of the first principles of legal science. Indeed, no knowledge or skill in practice can supply the place of early, thorough and systematic study of the "old masters." We hope, ere long, to see the Junior class in the law school, the largest.

To our Readers.—We are obliged to omit several reports, and our digest of cases, this month, to make room for the case of *D'Hauteville v. Sears and others*, which was received after a part of the present number was printed. In order to give the case of *Barry v. Mercein* in the present number, we have found it necessary to condense it very much. The case first above named has attained an importance we supposed impossible, by the extraordinary decision of the court—a decision, as it seems to us, altogether anomalous, and which cannot receive the approbation of the profession. We shall enter upon a review of it next month.

In our last number, on page 252, tenth line from the top, for "*the* lien," &c., read "*no* lien," &c. In the seventeenth line from the top, for "only *upon* the," &c., read "only *when* the," &c.

We have received the opinions of Chief Justice Gibson in *Gregg v. Blackmore* and *Dunlop v. Dunlop*.

MONTHLY LIST OF INSOLVENTS.

Insolvents.	*Occupation.*	*Place of Business.*	*Warrant issued.*
Burns, James,	Bookseller,	Boston,	November 21.
Coombs, Isaac B.,	Baker,	Boston,	November 12.
Gallup, George P.,	Trader & Mechanic,	Boston,	November 14.
Grove, Elizabeth P.,	Single-woman,	Cambridge,	November 5.
Howard, William H.,	Master Mariner,	Boston,	November 19.
Lewis, Wm. K., } Lewis, William, } [*Wm. K. Lewis & Co.*	Traders,	Boston,	November 7.
Magoun, Elisha Jr.,	Carpenter,	Boston,	November 24.
Mills, Richard,	Mason,	Worcester,	November 16.
Osbon, Elisha H.,	Innkeeper,	Worcester,	November 10.
Paine, Gardiner,		Worcester,	November 12.
Rollins, Mesheck W.,	Housewright,	Boston,	November 14.
Russell, David P.,	Cordwainer,	Lowell,	November 19.
Simpson, Hiram W.,	Innholder,	Lowell,	October 31.
Stone, Silas,	Trader,	Charlestown,	November 16.
Stockwell, Rufus,	Yeoman,	Millbury,	November 6.
Stow George W., } Stow, David, } [*G. W. & D. Stow*,	Traders,	Boston,	November 24.
Tebbets, Charles C.,	Merchant,	Boston,	November 28.
Warren, Joseph A.,	Baker,	Weston.	